Nos. 93-517, 93-527, 93-539

In the

Supreme Court of the United States

October Term, 1993

Board of Education of the Kiryas Joel Village School District, et al,
Petitioners,

v.

Louis Grumet and Albert W. Hawk,
Respondents.

ON WRIT OF *CERTIORARI*
TO THE NEW YORK COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

School boards across the country are dedicated to the proposition that all students should have equal access to an education to prepare them for a lifetime of learning in a diverse, democratic society and an interdependent global economy. *Amicus* supports the constitutional right of parents to educate their children in a private

religious school or at home, but it is not only unconstitutional but bad educational policy for the State to establish separate public schools for members of a religion. In so doing the New York State Legislature has viol,ated a principle at the very heart of the establishment clause, and in the name of expediency has totally eviscerated the purpose behind public schools to guarantee all students the right to a public education without regard to their race, color, sex or religion.

ARGUMENT

Introduction.

Petitioners and their *amici* claim that the State's action in this case merely "accommodates" the special education needs of a group of students who coincidentally are members of the same religion. That characterization is disingenuous. This is not a special education case. The long litigious history in this case has never pertained to

whether the school district was complying with its obligations under the IDEA. The dispute has always concerned *where* the services should be provided -- in a public school, a religious school or a "neutral" site.

The state and the school board did what political entities often do to solve this nagging local controversy they took the expeditious road. But the Constitution does not permit all political solutions to problems even if arguably taken in good faith. What the state did in this case was wrong, cutting to the very essence of the Constitution.

The state's actions do not raise special education issues but rather primal establishment clause issues. Can a state constitutionally create a system of religious apartheid? The answer should be a resounding "no." It matters not what test is applied by this Court. The core constitutional principle involved in this case is far more profound

than any test the Court might use or devise to protect it.

I. No educationally sound reasons justify Chapter 748.

A. Monroe-Woodbury could have complied with the IDEA without the drastic action taken by the State.

Petitioners and their *amici* imply that the action taken by the state in this case merely provides special education and related services to a number of Satmar students in accordance with the IDEA and the New York statutes adopted thereunder. But examining the IDEA itself and the course of litigation in this case clearly dispels the false notion that all Petitioner Kiryas Joel seeks in this case or that the other Petitioners sought to provide was secular education services in compliance with the IDEA. Such services either were being provided, or at least could have been provided, before Chapter 748 was adopted.

20 U.S.C. 1413 requires each state participating in the IDEA to make certain assurances. Among other requirements, a state's plan must include policies and procedures to assure "that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services." 20 U.S.C. 1413(4)(A). The statute distinguishes between private school students who are placed there by their parents for reasons other than compliance with IDEA -- such as the students at issue in this case who were enrolled in private religious schools but wanted to receive certain special education and related services from the public schools -- and students who are placed in a private school

because the public school is unwilling or unable to provide a "free appropriate public education" under the Act. 20 U.S.C. 1413(4)(B). *Burlington School Comm. v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985), and *Florence County v. Carter*, 114 S.Ct. 361 (1993), for example, involved students in private schools who were placed there by their parents because the public schools had allegedly failed in their responsibility to provide a "free appropriate public education" as required by the IDEA. In contrast, the student in *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993), was admittedly placed in the private school because the parents preferred a religious education for their child and they sought a related service from the public schools. The Department of Justice took the position in their brief in *Zobrest* that the school district would not be required by the IDEA to

provide a sign language interpreter to the child.

> [Respondent school district] maintains that the IDEA does not require it to furnish petitioner with an interpreter at any private school so long as special education services are made available at a public school. The United States endorses this interpretation of the statute, explaining that 'the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option.'"

113 S.Ct 2462, 2470 (Blackmun, J. dissenting 1993).

Although Monroe-Woodbury may elect to provide a wide variety of related services to the Satmars, as the school district in *Zobrest* did, the IDEA does not require the school district to assume the same level of responsibility for the educational needs of children placed at their parents' option in private schools as for those enrolled in the public schools. Private school students are entitled to a fair share of the services provided under the Act, but the panoply of

procedural requirements of the IDEA discussed at length in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), are not required to be met and the free appropriate public education requirement is more limited. Under this statutory framework, Monroe-Woodbury's and the Satmars' all or nothing duel was clearly unnecessary and resulted in a peace agreement that is patently unconstitutional. Other less drastic measures very likely could have been devised to serve most, if not all, of the disabled children in the community, without requiring the children to attend Monroe-Woodbury against their parents' wishes.

In an earlier case involving the on-going dispute between the residents of Kiryas Joel and the Monroe-Woodbury School District, the court noted that the disabilities of the children included "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities,

Down's syndrome, spina bifida and cerebral palsy." *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 531 N.Y.S.2d 174 (Ct.App.N.Y. 1988). Many of these children could be served outside the public school under current case law. In *Wolman v. Walter*, 433 U.S. 229 (1977), for example, the Court upheld the practice of providing speech and hearing diagnostic services in religious schools and providing therapeutic services at a neutral site. As noted above, a number of the disabilities are physical rather than mental, and require services more analogous to those in *Wolman*, than those in *Aguilar v. Felton*, 473 U.S. 402 (1985), in which this Court held that public employees could not provide remedial education on the premises of religious schools. Physical therapy and similar services could be provided either in the public school or in a neutral location. Because of the nature of these types of services which are delivered on

a one-on-one basis rather than in a classroom situation, the Satmars may not be as concerned about bringing their children to Monroe-Woodbury to receive the services. And those children who are profoundly disabled children could be educated at home without violating either the IDEA or the Constitution.

If no constitutional method is acceptable to the Satmarer parents, they must make a very difficult choice. But they cannot force the state to create a segregated school district in order to accommodate their religious beliefs or mores.

Accomodation of the Satmars' religious practices, and not educational issues, has been at the center of each action in the long history of this case. None of the cases has raised the question of whether the educational opportunities provided to the Satmarer disabled students by Monroe-Woodbury were educationally "appropriate" under the IDEA. In *Parents' Assn. v. Quinones*, 803 F.2d 1235

(2d Cir. 1986), the court enjoined the New York City School District from segregating Hasidic girls from other children in the school. *Bollenbach v. Board of Educ.*, 659 F.Supp. 1450 (S.D.N.Y. 1987), held unconstitutional Monroe-Woodbury's practice of using only male school bus drivers to transport male Kiryas Joel students to their religious academy. Finally, in *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174 (1988), the school district sought a declaratory judgment to the effect that state special education statutes prohibit the district from providing special education services except in regular classes of public schools. The defendants counterclaimed, seeking a ruling that the services must be provided in the private religious school. The defendants later limited their demand to a "neutral" site. The New York Court of Appeals refused to hold that the law *requires* that the

services be provided in any particular setting and stated that the board "is not without authority" to provide the services outside the public school.

In *Wieder* the defendants raised the issue of infringement of free exercise of religion rights for the first time in the court of appeals, arguing that Monroe-Woodbury's "public school placements interfere with the free exercise of their sincere religious beliefs . . ., that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other." 72 N.Y.2d at 188. The court refused to rule on the issue, noting that "the *defendants* in their submissions to the trial court [argued] that they should be exempted from public school placements only for *nonreligious* reasons.

They made no showing that any sincere religious beliefs were threatened by requiring limited public school attendance, only for special services . . . Thus, there is no basis here for the constitutional right now asserted by defendants and found by the trial court. [Emphasis in the original.]" *Id.* at 189.

Perhaps now to soften their claim that religious segregation is not the primary issue here, the brief of Petitioner Kiryas Joel misstates the reason for the court of appeals rejection of the parents' free exercise claim in *Wieder*. Brief of Petitioner Kiryas Joel at p. 8. The court's rejection was *not* based, as is implied in Petitioner's brief, on the "explicit conclu[sion] that the emotional impact on the children of traveling out of Kiryas Joel' alleged by the parents was a 'nonreligious reason' for keeping the disabled Satmar children out of the Monroe-Woodbury schools."

No one disputes the fact that there are children in the Kiryas Joel community who are in need of special education services and who are eligible for services under the IDEA. Monroe-Woodbury contended in *Wieder* that the children who attended the public school programs were progressing in their education. 72 N.Y.2d at 181. But we don't know whether or not they were progressing. We don't know what services would be appropriate for each of the children or what would be the appropriate educational placement for each child. We don't know whether the issue of appropriate education was ever even discussed. Instead, Petitioners opted to form a new general purpose school district for the exclusive use of the Satmars. The motivating force behind Chapter 748 was not to provide an appropriate education for students with disabilities, it was passed to allow students of one religion to be educated in an environment segregated from students of other religions. There is no

question that the statute was passed for religious not educational reasons.

B. Monroe-Woodbury could have provided needed English as a second language training without establishing a separate school district for the students on the basis of their national origin.

Petitioners argue that the separate school district was necessary because the Satmar students do not speak English. If that were a valid educational argument, most of the school districts in this country would be segregated on the basis of national origin. The number of limited English proficient students is growing in many school districts across the country. U.S. General Accounting Office Report to the Chairman, Senate Committee on Labor and Human Resource, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts*, (January 1994). According to the GAO, more than 21.3 million limited English proficient students live in the United States.

The report cites one district that had 99 Rumanian students located in 12 different schools and representing six grade levels. This same district had several schools with students from as many as 15 different language backgrounds, often with fewer than 24 students in a given language groups. *Id.* at 10. The problems of educating the Satmars may present an educational challenge, but similar challenges are being met by many school districts across the country without the need to carve out separate school districts. This country has avoided the problems Canada is facing with its French-speaking population because of our constitutional guarantees against discrimination, our laws against segregation and our educational programs that teach students in their native language while preserving their cultural diversity.

Segregation on the basis of national origin is a violation of title VI of the Civil Rights Act of 1964, which prohibits

discrimination on the basis of race, color or national origin by recipients of federal financial assistance. 42 U.S.C. § 2000d. A number of years ago the U.S. Department of Education (then the Department of Health, Education and Welfare) developed what has become known as the "Lau Guidelines," to provide guidance on the requirements of title VI to rectify language deficiencies of limited English speaking students. 35 Fed. Reg. 11595 (1970). This Court upheld those guidelines in *Lau v. Nichols*, 414 U.S. 563 (1974). Although the guidelines have been challenged since that time on the ground that title VI prohibits only *intentional* acts and does not cover acts which have a discriminatory *impact*, *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), it is clear that the educational remedy is not to segregate all the children into a separate school district. The remedy is to teach them English as soon as possible, and where necessary, to teach them

core subjects in their native language. Monroe-Woodbury would not be precluded by either the establishment clause or title VI from the limited use of segregated classes for the purpose of teaching English to the Satmars. That would also seem to be a far more cost effective and educationally sound way to teach the Satmars than to segregate them into a separate school district.

Although not the subject of this lawsuit, it would appear that Chapter 748 is a clear violation of both the Equal Protection Clause and title VI because it segregates students on the basis of their national origin.

II. Chapter 748 strikes at the core of the Establishment of Religion Clause and should be held unconstitutional under any of the "tests" currently in use or one which this Court creates for the decision in this case.

Petitioners and their *amici* have urged this Court either to apply the tripartite test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to uphold the statute or to overturn *Lemon* in favor of a coercion or endorsement test. *Amicus* believes that the issue in this case is so clear that the Court should hold the statute unconstitutional under any of the proffered constitutional tests. *Amicus* urges the Court, however, in the event it elects to develop a new test for the decision in this case, to refrain from formally overruling *Lemon v. Kurtzman*, which could send the wrong message to school districts across the country and to those who seek to bring religion back into the schools.

A. Chapter 748 is unconstitutional under *Lemon* and other proposed substitutes for the *Lemon* test.

Amicus agrees with the New York Court of Appeals' conclusion that Chapter 748 is unconstitutional under *Lemon v. Kurtzman* and incorporates by reference the arguments on this subject contained in Respondents' brief.

In *Comm. for Public Ed. v. Regan*, 444 U.S. 646 (1980), Justice White writing for the majority upholding a New York statute which authorized reimbursement to sectarian schools for their expense in performing state mandated recordkeeping and testing services, noted the difficulty that courts have had in deciding religion cases which "stir deep feelings."

> [W]e are divided among ourselves, perhaps reflecting the different views of this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices *clarity and predictability for flexibility*, but this promises to be the case until the continuing interaction between the courts and the States ... produces a single , more encompassing construction of the Establishment Clause [Emphasis supplied.]"

Id. at 662.

Justice Scalia in his dissent in *Edwards v. Aguillard* declared the reverse, that it is time to "sacrifice some 'flexibility' for 'clarity and predictibiliy.'" 403 U.S. 602, 640 (1987).

However difficult it may be under current law to delimit the parameters of permitted public assistance to private religious schools or public school students, the facts in this case do not present the usual line-drawing dilemmas. This is a case of intentional state segregation of students on the basis of religion. Justice Rehnquist stated in his dissent in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 126, 129 (1982) (Rehnquist, J. dissenting), that "we do not need a three-part test to decide whether the grant of actual legislative power to churches is within the proscription fo the Establishment Clause of the First and Fourteenth Amendments." Similarly, we don't need a three-part test to

decide whether a school district organized and intended for the exclusive use of one religion is within the proscription of the Establishment Clause.

Amicus urges this Court to avoid explicitly overruling that decision. In spite of the difficulty application of the Lemon test may sometimes cause, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case expressly overturns *Lemon* in order to develop a "new test" assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools cases are no longer "good law" or at least are questionable. Any serious move from the strong stand this Court has held in the past to separate religion and the state will be a clarion call to those who want to establish religion in the schools.

The Court can merely ignore *Lemon* and apply other precedents, as it did in *Zobrest v. Catalina Foothills School District*; or use a different test without citing *Lemon*, as it did in *Lee v. Weisman*, 112 U.S. 2649 (1992). But *Amicus* urges the Court not to jeopardize all of the rulings decided under *Lemon* by formally overturning the decision, merely in order to tidy up the legal landscape.

If establishment clause precedent is suddenly thrown into disarray by abandonment of the *Lemon* test, schools no doubt will face the very kind of religious divisiveness against which the first amendment is intended to guard. Given the vast ethnic and religious diversity among those who attend and work in the public schools reversal of *Lemon* could take public schools and their leaders down a perilous road.

B. Chapter 748 establishes a system of religious apartheid that is unconstitutional on its face and reprehensible as a matter of educational policy.

The annals of American history are replete with examples of minorities seeking refuge from religious persecution, from Brigham Young and his Morman followers to the refugees from Hitler's death camps. The Satmars came to this country for the same reason as other oppressed minorities, seeking a land where the law protects minorities from discrimination by the majority.

The Satmars have the Constitutional right to form their own private schools, *Society of Sisters v. Pierce*, 268 U.S. 510 (1925), and to provide a religious education to their children free from interference by the State, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Tolerance is not merely a moral virtue, it is a matter of constitutional policy. But the religious diversity protected from interference by the Constitution creates a parallel need for a constitutional restraint keeping the state from establishing religion. When the state establishes a public school

district for the exclusive use of members of a religious sect solely in order to segregate the members of the sect from those outside the religion, the state establishes religion.

Petitioners' arguments seem to be somewhat contradictory. They argue first that because the services provided by the public school district are "secular," it does not matter that all of the students are Hasid. Second, they argue that the state's action in creating the district was merely "accommodating" the religious tenets of the Hasidim and, third, they contend that any benefit to religion is merely "incidental."

1. The issue is not the neutrality of the services provided; it is the *service delivery system* that is the problem.

Unfortunately, the State and Monroe-Woodbury totally miss the point in their arguments in this case. They assert that all the state sought to do was provide an opportunity for a group of children to receive special education and related services and

training in English. That argument is akin to Louisiana's argument in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that it was just transporting citizens; or to the argument of Kansas in *Brown v. Board of Education*, 347 U.S. 483 (1954), that it was just educating kids; or South Africa's system of apartheid was merely an "accommodation" to a minority of its citizens.

Petitioners Monroe-Woodbury and Attorney General of New York equate this case with the state's provision of fire and police services to a religious community. That is a *non sequitur*. Since this is a facial challenge, we must accept as true the assertions of the Petitioners that students in Kiryas Joel are not segregated by sex and the curriculum is entirely secular; we must assume that the services provided in the segregated setting are "neutral." But the issue in this case is not neutrality of the services provided, it is the service delivery *system* that is the

problem. Would an ordinance that establishes one fire department to serve houses with mezuzahs on the doorposts and one to serve houses with crosses on the doorposts pass constitutional muster?

Here the state has done exactly that with regard to education -- it has created a separate general purpose school district for the sole reason that members of a religious group, who all sides admit are the only residents of the Village, want to segregate their children from those who are not members of their religion. Petitioners' attempts to characterize the Satmarer Hasidim's desire to segregate as "secular" is not credible. The Governor's statement on signing the legislation noted that it was "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, *whose population are all members of the same religious sect.*" Joint Appendix at 40.

Petitioners argue that because the Kiryas Joel School District encompasses the same boundaries as the Village of Kiryas Joel and because anyone is entitled to move into the village and attend the public school, the school district cannot be said to be segregated. Although the constitutionality of the Village is not at issue in this case, it is arguable that the Village itself is unconstitutional. The decision of the supervisor approving the petition for the creation of a new village and ordering an election did not, of course, reach this issue because he was authorized only to determine whether procedural requirements were met. But his decision is replete with references to the actual reasons behind the petition. The supervisor stated that since fire, police, transportation and highway services are at least, if not more, adequate as those in the rest of the Town of Monroe, "why then is there a need to incorporate?" He concluded that

the reason lay in the "makeup of the individuals who will reside within this new village" who are all of the Satmar Hasid faith.

> [T]he sociological way of life for the Satmar Hasidic is one of *disdained isolation* from the rest of the community. These factors are at the root of their need to incorporate. . . The Satmar Hasidim has taken advantage of an obviously archaic State statute to slip away from the Town's enforcement program without the Town having the slightest possibility of commenting on the inappropriate reasons for formation of the new village. [Emphasis supplied.]

Joint Appendix at 10-14.

Petitioners argument that anyone is free to move into the community and attend the public school is not realistic given the history of the community and the nature and intensity of their religious beliefs. It is not likely that the Kiryas Joel School District will ever be integrated. The Satmars are regulated by their religion and their Rabbi in virtually all aspects of their daily

lives -- including dress, the absence of television, English newspapers and segregation of the sexes in the Village. Although no ordinances, recorded legal instruments or other governmental regulations restrict ownership of property in Kiryas Joel, pressures are imposed on the Satmars by their leadership and their deeply held religious convictions. It is doubtful that any resident of the Village of Kiryas Joel would rent or sell their property to an outsider, because of the fear of possible retribution by their religious leadership. *New York Times*, January 3, 1994, p. A 20, *Der Yid*, Friday, February 3, 1989, Vol. XXXVIII No. 19. Furthermore, even were non-hasadic students to move into the Village, they would not go to school in the Village. The Monroe-Woodbury school district in a letter to the Governor urging that he sign Chapter 748, stated that non-hasidic students will be "tuitioned out" to Monroe-Woodbury. Pet. App. (AG) at 101a.

Therefore, the Petitioners have made certain that the school district remains totally Hasidic, in the unlikely event that a non-Hasid child should move into the community.

2. Chapter 748 is not a mere "accommodation" of religion or of the secular educational needs of the Satmars. It is establishment of religion in its purest form.

Petitioner Attorney General of New York equates the action of the state here with constitutionally permissible "accommodations" in *Zorach v. Clauson*, 343 U.S. 306 (1952), and *Wolman v. Walter*, 433 U.S. 229 (1977), and notes that the state can voluntarily "accommodate" religion without establishing religion. That is correct, provided the "accommodation" is not a total capitulation to the religious demands of those that seek the accommodation. There is an ocean of difference between allowing students to leave school early, providing therapeutic services to students, or exempting persons from otherwise neutral state requirements, such as

the prohibition of the use of peyote or compulsory attendance laws, because of religion and the action taken by the state here. Certainly, the Constitution allows, and in some cases may require, the state to lift the burden it has placed on religious freedom by providing an accommodation through an exception to, or adaptation of, a requirement. That is what the Court required in *Yoder* and what the peyote exemption statutes do. But Chapter 748 is not an accommodation, it grants an extraordinary benefit to members of one religion. It creates a separate public school district for the sole purpose of segregating members of one religion from non-believers in the other district. Petitioners may call that an "accommodation" but *amicus* can find no decision of this Court that would allow, as an accommodation, the segregatory statute at issue here.

The "accommodation" cases cited by Petitioners are inapposite. In *Wisconsin v.*

Yoder, 406 U.S. 205, the Court required the state to grant an exemption from compulsory education in order to relieve the substantial "burden" on their free exercise beliefs. The Satmars seek no exemption but rather seek *segregated* educational services. *Wolman* is not an "accommodation" case and, in fact, as was noted above, *Wolman* would allow many of the services allegedly sought in the case to be provided in the public school, thus alleviating any need to form a separate district.

Whether one considers the establishment clause as a Jeffersonian "wall" or a way to protect religious liberty, the clause prohibits the kind of action taken here because this type of intentional state segregation of religion -- even if arguably to accommodate the religious beliefs of one faith -- endangers the religious liberties of us all.

3. The religious segregation mandated by Chapter 748 is not merely an "incidental" consequence of the state's attempt to provide special education services and English language training, segregation is the *only* goal of the statute.

Petitioner Attorney General, citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), argues that the religious segregation of the two school districts in this case is merely an "incidental" benefit to religion arising from the state's attempt to provide special education services to the children of Kiryas Joel. Brief of Petitioner Attorney General, p. 19. If the religious consequences of Chapter 748 are only "incidental" to the legislation, why has the Monroe-Woodbury attempts to educate the Satmars been the subject of lawsuits since 1985, that challenged not the appropriateness of the services but rather their provision in an integrated setting. Like the litigation, the location of the education is not "incidental"

to the legislation, but in fact its very purpose is to create religious segregation.

Even were it true that such segregation is not a religious tenet of the Satmars, that would not save this legislation from its legal infirmities, because segregation on the basis of religion is unconstitutional regardless of whether it is arises from religious culture or religious tenet. This Court has wisely been reluctant to draw bright lines in determining whether religious beliefs are sincerely held and there is no need to do so here. *See, e.g., United States v. Ballard*, 322 U.S. 78 (1944). Whether the Satmars sought a separate educational setting for their children because of their religious tenets, as claimed by the Satmars in the court of appeals in *Wieder*, or because of the cultural values arising out of their religion, as claimed by Petitioner Attorney General, the fact remains that Chapter 748 was passed to separate the Satmars from the students in Monroe-Woodbury. Neither

a constitutional free exercise right nor a statutory right to special education gives rise to a right to receive a segregated special education. The Satmars do not have the right to force the state to provide a public education to their children in a segregated environment in order to accommodate their religious tenets or their religious culture and the state does not have the authority to do it voluntarily.

Our country is unique in its protection of religious freedom. What separates this country, even given its tremendous religious diversity, from places like Northern Ireland, Lebanon, Iran, Bosnia and other parts of the world is that our Constitution considers all religions important enough to require the State to leave them all alone.

C. State created religious segregation, even if benevolent, is unconstitutional.

The creation of this religiously segregated district at issue here in some

respects resembles the state's action in *United States v. Scotland Neck City, Board of Education*, 407 U.S. 484 (1972). In that case, this Court overturned the action of the State of North Carolina creating a separate school district for the City of Scotland Neck for the sole purpose of avoiding a desegregation decree affecting the county in which Scotland Neck was located. A concurrence by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist pointed out that the action taken in creating the separate district was "substantially motivated by the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck. In other words, the new system was designed to minimize the number of Negro children attending school with the white children residing in Scotland Neck." *Id.* at 492.

In a similar vein, the State of New York has carved out a separate school district in

order to minimize the number of non-Hasidic students attending school with the Hasid. The purpose here is no more just to provide special education than was the action of the State of North Carolina designed only to provide education. In both cases the action was taken to provide a *segregated* education.

The question then arises as to whether it matters that the State acted in good faith. No harm, no foul? *Virtuous* state-imposed religious segregation is an oxymoron but, for the sake of argument, let us assume that the residents of Monroe-Woodbury and the residents of Kiryas Joel support Chapter 748 and, therefore, the action was arguably benevolent. This Court's decisions in other contexts reveal that state benevolence alone cannot justify otherwise unconstitutional segregation. In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), this Court stated that in a voting rights case raising an equal protection claim, invidious intent is relevant only in order to

uphold a claim of vote *dilution*. The Court overturned South Carolina's racial gerrymander stating that "Nothing in [*United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977)], holds that "benevolent racial gerrymandering" is not unconstitutional. The Court concluded that if the allegation of racial gerrymander remains uncontradicted, the lower court must determine whether the state's action was narrowly tailored to further a compelling governmental interest.

This Court has also dealt with so-called benign racial decisions in its affirmative action decisions. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court held that a school board must show that extending protection from layoffs on the basis of race must be justified by showing that it is narrowly tailored to meet a compelling state interest. Societal discrimination alone is insufficient to justify preferences.

Similarly, in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the Court overturned the city's program of granting racial preferences to contractors without narrowly tailoring it to a compelling state interest.

Chief Judge Kaye in her concurrence in this case states her belief that *Larson v. Valente*, 456 U.S. 228 (1982), should control the decision in this case. In that case, this Court developed an alternative test to *Lemon* in deciding cases involving discriminatory treatment of religions. Under that test courts would treat religion as a suspect class, which it is by virtue of its being a fundamental right under the Constitution, and would require the state to justify its action as being narrowly tailored to meet a compelling governmental interest. Chief Judge Kaye's concurrence cites the case in support of her belief that a equal protection standard is an appropriate test to be used in this case.

The State's creation of a separate public school for a small religious sect perhaps sends no signal to any other religion that the state favors the Hasidim and may seem benevolent, but if we say the law of the land permits this type of segregation, it does not end here. If it is not wrong for the state to set up a segregated school district for the Hasidim, then why would it be wrong to set up a separate school district for blacks in Detroit, Spanish-speaking immigrants in Florida, or Mormons in Utah? State-imposed segregation is unconstitutional; it is wrong and it is atrocious educational policy.

The question in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was not over the quality of education provided to members of the two races, the question was whether state mandated separation of the races in the schools violated principles of Equal Protection. *Brown* held that separate was inherently unequal and, therefore, violated the equal

protection rights of the minority race. That principle also applies where it is the minority race that seeks separation. Furthermore, in this case members of the majority religion who are enrolled in Monroe-Woodbury are members of minority races and believe, even though without foundation, that the Satmars are racially motivated in their desire to segregate themselves from the rest of Monroe.

Although *Valente* is factually distinguishable from this case because it concerned state discrimination in the form of denial of benefit to a minority religion, as opposed to granting of a benefit to a minority religion as is the case here, the compelling state interest test used in *Valente* and in equal protection cases would seem to be equally applicable because of the close parallel between race discrimination and discrimination on the basis of religion.

Certainly, religion is no less a suspect class than race. *Newsday*, September 3, 1986.

It would appear that a simple prohibition on segregation on the basis of religion in the absence of a showing that the state's policy is narrowly tailored to achieve a compelling governmental interest would protect the religious liberties of the protected class while assuring that the state does not itself establish religion. There are other ways to serve the secular educational needs of the Satmars than through total segregation in a separate school district. There may come a time when a particular child cannot be adequately served by the public schools without violating either his or her religious principles or the principle of establishment clause but there is no evidence that has happened yet. In that situation, which *Amicus* submits will not occur often, the choice of whether to forfeit government benefits or religious principles will have to be made by

the particular Satmar family in a similar vein to what they allegedly have done here when they refrained from adhering to sex segregation rules of their religion in order to partake of the special education benefits in the Kiryas Joel School District.

It is far too early to tell whether the Satmars can be served by the Monroe-Woodbury School District because the controversy has never related to pedagogical concerns. There is enough flexibility in this Court's establishment decisions to allow many, if not most, students to be served in neutral settings. If the problem in this case is indeed pedalogical, as asserted by Petitioners, then pedological tools must be used to remedy it. What the State has done here violates every principle of good pedogogy and good government and is unquestionably unconstitutional.

Conclusion

For the foregoing reasons, *Amicus* urges this Court to affirm the court of appeals decision in this case.

Respectfully submitted,

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